IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted] 109

MARGARET E. SNYDER, Also Known as PEG SNYDER,
Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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Textbooks Cited.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner Margaret E. Snyder, also known as Peg Snyder, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 27, 1968.

CITATIONS TO OPINIONS BELOW.

The opinion of the United State Court of Appeals for the Eighth Circuit is not reported and is printed in Appendix A hereto, infra, pp. 13-14, and in U. S. C. A. Pro-

ceedings, Pages 1-2.[1] The opinion of the United States District Court for the Eastern District of Missouri is not reported and is printed in Appendix B hereto, infra, pp. 15-22, and in Printed Record at Pages 16-23.

JURISDICTION.

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 27, 1968 (U. S. C. A. Proceedings, Page 3). Petitioner's Petition for Rehearing, or, in the Alternative, to Transfer to the Court En Banc, was duly and timely filed in said United States Court of Appeals for the Eighth Circuit (U. S. C. A. Proceedings, Page 4). Said Petition for Rehearing, or, in the Alternative, to Transfer to the Court En Banc, was denied on March 22, 1968 (U. S. C. A. Proceedings, Page 16).

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTION PRESENTED.

Whether under Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

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[1] For convenience the Record of the District Court proceedings will be herein referred to as the Printed Record and the Record of the proceedings of the Court below, inserted immediately following such Printed Record, will be referred to as the U. S. C. A. Proceedings.

STATUTE AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED.

28 U. S. C., § 1332 (a) (1). The said 28 U. S. C., § 1332 (a) (1) provides:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;"

Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966. The provisions in said rule are lengthy and the text is set forth in Appendix C hereto, infra, pp. 23-26.

STATEMENT.

Petitioner filed this class action pursuant to Amended Rule 23, Federal Rules Civil Procedure, effective July 1, 1966 in the United States District Court for the Eastern District of Missouri, Eastern Division, to recover judgment in the amount of $1,200,000.00 for the class (Printed Record pp. 1-5). In her Amended Complaint (Printed Record pp. 9-13) Petitioner alleged that:

Petitioner is a citizen of Arizona and the Respondents are citizens of Missouri; there is diversity of citizenship, and the amount in controversy exceeds $10,000.00 exclusive of costs and interest; since prior to November 22, 1966, Petitioner has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (Missouri Fidelity) and owns 2,000 of said company's shares; the bylaws of Missouri Fidelity provide for a board of fifteen directors and Respondents at all times relevant were members of said board; on or about November 22, 1966 eight of the Missouri Fidelity directors including the Re-

spondents entered into an agreement with National Western Life Insurance Company (National Western) whereby and in pursuance of which National Western purchased from such eight directors and relatives and friends of theirs 300,000 Missouri Fidelity shares and paid them therefor a premium of about $1,200,000.00 in excess of the then market price and as condition for such purchase said eight directors resigned, and such proceedings were had that five nominees of National Western were elected directors of Missouri Fidelity and as a majority of its executive committee and of its investment committee; such premium of $1,200,000.00 was paid by National Western for the resignations of the directors who so resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity; the mentioned conduct and acts of said eight directors including Respondents were a breach of trust and in violation of their duties as Missouri Fidelity directors;

The class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Petitioner brings this action on behalf of herself and all other shareholders of Missouri Fidelity; that by reason of the aforesaid matters the said premium of approximately $1,200,000.00 should be distributed to Petitioner and the other shareholders of Missouri Fidelity similarly situated.

The prayer in the amended complaint prayed that the Court enter its Order determining that a class action shall be maintained and that the Court enter judgment in the amount of $1,200,000.00 in favor of Plaintiff and other Missouri Fidelity shareholders in accordance with the Missouri Fidelity shares held by them respectively and for attorneys' fees and costs and that the Court's judgment include and describe those whom the Court finds to be members of the class.

The Respondents filed a motion to dismiss the Amended Complaint (Printed Record p. 14). Such motion alleged various grounds for dismissal of the Amended Complaint, including lack of jurisdictional amount. In its Opinion the District Court stated that for reasons set forth in its Opinion the Court need only consider the question of lack of jurisdictional amount (Printed Record p. 18).

The Respondents contended that if the Petitioner has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such action may not be determined by aggregating the amounts which might be claimed by others in the class action, and that the Petitioner's individual claim can amount to no more than $8,740.00. The Petitioner, on the other hand, contended that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action under said Amended Rule 23 is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount (District Court's Opinion, Printed Record, p. 18).

The District Court sustained Respondent's motion to dismiss Petitioner's Amended Complaint and dismissed the action without prejudice on the ground that Petitioner's claims are separate and distinct from those of other persons in the class, that Rule 23 as amended has not changed the rule existing prior to the amendment that in such a case the claims could not be aggregated in arriving at the jurisdictional amount, that therefore Petitioner may not aggregate her claim with those of others in the class, that Petitioner alleged her damages at $8,740.00, and that accordingly, the amount in controversy does not exceed $10,000.00 and the Court therefore lacked jurisdiction over the controversy. The District Court's Memorandum

Opinion and Order of Dismissal appears at Printed Record pp. 1-16 and is printed in Appendix B hereto, infra, pp. 15-22.

On Petitioner's appeal, the District Court's said Order and Judgment was affirmed on February 27, 1968, by the United States Court of Appeals for the Eighth Circuit on the basis of the District Court's opinion and of the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 Federal 2d 992 (5th Cir. 1967), cert. denied, 389 U. S. 826 (1967) (Eighth Circuit Court of Appeals Opinion, Appendix A, infra, pp. 13-14; U. S. C. A. Proceedings, pages 1-2). The Court of Appeals Judgment was entered on February 27, 1968, and is set forth at U. S. C. A. Proceedings, p. 3. Rehearing was denied on March 22, 1968 (U. S. C. A. Proceedings, page 16).

On February 23, 1968, in the case of **The Gas Service Company v. Coburn, etc.**, not yet reported in the Federal Reporter, the United States Court of Appeals for the Tenth Circuit rendered a decision in direct conflict with the above mentioned opinions of the District Court and of the Court of Appeals for the Eighth Circuit, and of the ruling of the Fifth Circuit in **Alvarez**, above mentioned, on which the Eighth Circuit relied in the instant case (The Fifth Circuit Court of Appeals decision in **Alvarez** is set forth in Appendix E, infra, pp. 34-44.

On March 14, 1968, Petitioner timely filed in the Eighth Circuit Court of Appeals her Petition for Rehearing or in the Alternative, to Transfer to the Court En Banc and therein called attention to the above mentioned ruling and decision of the Tenth Circuit Court of Appeals and filed with her said Petition as an appendix thereto a copy of the Opinion of the Tenth Circuit in **The Gas Service Company**, supra. Said Petition is set forth commencing at page 4 of U. S. C. A. Proceedings, and the

opinion of the Tenth Circuit in **The Gas Service Company** is set forth in U. S. C. A. Proceedings, pages 10-15 and in Appendix D, infra, pp. 27-33.

In **The Gas Service Company v. Coburn,** supra, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither "joint" nor "common" yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., Section 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company,** 375 F. 2d 992, relied on by the Eighth Circuit in the instant case, the Tenth Circuit stated: "We must respectfully disagree • • •"

Petitioner's said Petition for Rehearing, or in the Alternative to Transfer to the Court en Banc, was denied by the Eighth Circuit Court of Appeals on March 22, 1968. U. S. C. A. Proceedings, p. 16.

REASONS FOR GRANTING THE WRIT.

The decisions of the Eighth Circuit Court of Appeals in the instant case (Appendix A hereto, infra, pp. 13-15) and of the Fifth Circuit Court of Appeals in **Alvarez v. Pan American Life Insurance Company,** 375 Fed. 2d 992, cert. denied, 389 U. S. 826 (Appendix E hereto, infra, pp. 34-44), upon the authority of which the instant case was decided, are directly in conflict with the decision of the Tenth Circuit Court of Appeals in **The Gas Service Company v. Coburn, etc.,** not yet reported in the Federal Reports (Appendix D, infra, pp. 27-33); The question at issue here involved is of great importance in the adminis-

tration of justice and is a matter of great importance with respect to the interpretation and application of Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966; It is of great importance in the administration of justice that there be a uniform interpretation and application of Rule 23 of the Federal Rules of Civil Procedure, as amended in July, 1966, among the United States Courts of Appeal; By its decision the Court below has decided an important question of Federal law which has not been, but should be, settled by this Court and particularly since Court of Appeals' decisions on such questions are in conflict; The decisions of the Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in **Alvarez**, supra, do injustice to the Petitioner herein and will have the effect of preventing small claimants from having a forum in which to seek redress for alleged wrongs and said decisions are thereby in direct conflict and derogation of the purposes of said Rule 23, as amended.

Prior to the amendment of Federal Rule 23 the action here involved would have been classified as a "spurious" class action and the aggregation of claims to satisfy the jurisdictional amount requirement of 28 U. S. C., Section 1332, would not have been permitted. **Pinel v. Pinel**, 240 U. S. 594, 60 L. Ed. 817, 36 Sup. Ct. 416. The theory of **Pinel**, supra, was that aggregation should be allowed if the claims of the Party—Plaintiffs were "joint" or there was a "common interest" involved (sometimes referred to as a "true" class action) but not in cases where the claims of the Party-Plaintiffs were several (sometimes referred to as "hybrid" or "spurious" class action).

Rule 23 as amended in July, 1966, completely eliminated the distinction between true, hybrid and spurious class actions and for the first time provides that in an action proprely brought as a class action under Amended Rule 23 there may be a binding judgment on all members of

the class regardless of whether or not said class members have entered their appearance in the case and regardless of whether or not the judgment is favorable to the class. The purpose of these important changes made by said Amended Rule 23 was to broaden and make more flexible the provisions as to class actions and to provide a forum for small claimants who might otherwise, for practical reasons, be deprived of their day in court. In many cases the cost of investigating and pursuing an individual action is prohibitive for the small claimant. It was contemplated by the framers of Amended Rule 23 that small claimants could under said Amended Rule 23 now attain a just adjudication of their claims because of the economics of the class action provisions of Amended Rule 23.

Judge Alexander Holtzoff, recognizing the intentions and purposes of Amended Rule 23 to broaden and make more flexible said Rule has, in commenting on the new Amended Rules, stated that:

> "The Rules as to class actions is broadened and made more flexible. This distinction between true, hybrid and spurious class actions is abrogated. The ultimate result is that as liberal as the Rules were, the progressive Amendments now adopted make them still more liberal and still more flexible." **Holtzoff, a Judge Looks at the Rules**, Rules of Civil Procedure and Judicial Code, p. 19 (1966 Ed.).

Charles Alan Wright, Professor of Law at the University of Texas and a member of the Committee on Rules of Practice and Procedure which drafted the revised rules, and who has long been a leading authority on the Federal Rules, in commenting on the broadened and more flexible purposes of Amended Rule 23, stated:

> "* * * it was held under the former rule that aggregation of the claims of all members of the class

was permitted in the 'true' class action, where the rule required a 'joint' or a 'common' interest, but not in 'hybrid' or 'spurious' class actions. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversies.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached." **Barron & Holtzoff, Federal Practice and Procedure**, Sec. 569 (Supp., p. 58, 1966).

The Eighth Circuit Court of Appeals in the instant case and the Fifth Circuit Court of Appeals in **Alvarez**, supra, completely ignored and rejected the very comprehensive changes contemplated by the amendment to Rule 23 and in effect based their decisions on the old **Pinel** doctrine. The Tenth Circuit Court of Appeals in **The Gas Service Company case**, supra, in rendering its decision in direct conflict to the said Eighth Circuit and Fifth Circuit Courts of Appeal decisions, specifically recognized the very comprehensive changes contemplated by Amended Rule 23 and with respect to the Fifth Circuit Court of Appeals decision (the decision in the instant case had not been rendered at the time) stated:

"We must respectfully disagree."

The Tenth Circuit Court of Appeals in **The Gas Service Company** case, supra, recognized that the procedural tool of a class action must be workable if it is to be desirable and that to hold that the old **Pinel** classifications of

"true", "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would render Amended Rule 23 sterile as a workable procedural tool.

CONCLUSION.

For all the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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APPENDIX.

APPENDIX A.

Opinion.

United States Court of Appeals
For the Eighth Circuit

No. 18-881

Margaret E. Snyder, Also Known as Peg Snyder,
Appellant,
v.
Charles Harris and Earl W. Kirchhoff,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[February 27, 1968.]

Before Van Oosterhout, Chief Judge; Matthes, Circuit Judge, and Harris, District Judge.

Per Curiam.

Plaintiff, appellant herein, filed this class action pursuant to amended Rule 23, Fed. R. Civ. P., effective July 1, 1966.

Upon motion of the defendants the district court, Honorable Roy W. Harper, Chief Judge, dismissed the action on the ground that the damages claimed by appellant, exclusive of interest and costs, did not exceed the $10,000.00

jurisdictional amount requisite for diversity jurisdiction under 28 U. S. C., § 1332. *Snyder v. Harris,* 268 F. Supp. 701 (E. D. Mo. 1967).

The pertinent allegations of the complaint are fully incorporated in Judge Harper's opinion and need not be restated here.

The sole question for determination is whether amended Rule 23 allows the plaintiff in a class action to aggregate her claim with those of other class members whom she represents for purposes of satisfying the jurisdictional amount under Section 1332.

Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 Barron & Holtzoff, Federal Practice and Procedure, § 569 (Supp. 1967, at 106) that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy and therefore should be aggregated to satisfy the jurisdictional amount. We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed to or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332.

On the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in *Alvarez v. Pan American Life Insurance Company,* 375 F. 2d 992 (5th Cir. 1967), *cert denied,* 389 U. S. 827 (1967), we affirm.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

In the United States District Court,
Eastern District of Missouri,
Southeastern Division.

Margaret E. Snyder, also known as Peg Snyder,
Plaintiff,
vs.
Charles Harris and Earl W. Kirchhoff,
Defendants.
No. S 66 C 78.

Harper, Judge.

Memorandum Opinion and Order.

(Filed in U. S. District Court on April 27, 1967.)

This matter is before the court on the joint motion of the defendants to dismiss the amended complaint. The motion has been submitted on the briefs of the parties and oral argument.

The plaintiff seeks to bring this action as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, as amended July, 1966. The relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff, are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds $10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company;

that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action members of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about $2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for $7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs $7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the aforesaid conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about $1,200,000.00; and that the aggregate amount paid by National Western

for the said shares was approximately $1,200,000.00 in excess of the market value of said shares and was a premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity.

The amended complaint prays for judgment in the amount of $1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings.

The present motion alleges various grounds for dismissal of the amended complaint, including lack of jurisdictional amount. For reasons hereinafter set forth, this court need only consider the question of lack of jurisdictional amount.

The defendants contend that if the plaintiff has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such an action may not be determined by aggregating the amounts which might be claimed by others in the class action. Further, the defendants contend that the plaintiff's individual claim can amount to no more than $8,740.00. The plaintiff, on the other hand, contends that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount.

The law concerning the aggregation of claims in a class suit before the amendment in July, 1966, to Rule 23, F. R. C. P., is fairly stated in Moore's Federal Practice, § 23.13, p. 3480, to-wit:

"In the case of joinder of plaintiffs the matter of aggregation of claims is ruled by the doctrine of Pinel v. Pinel (240 U. S. 594, 60 L. Ed. 817). There the rule was laid down that if the demands of the plaintiffs are 'separate and distinct', each must have a claim in the jurisdictional amount, while if they unite to enforce a joint or common interest aggregating is permissible. These principles apply with equal force in the class action, since the class action is but a procedural device to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants. Thus in the case of a true class action, if instead of bringing a class action the members of the class joined as plaintiffs, the jurisdictional amount would be determined by the joint or common claim; no one has a several claim. Unless the class suit were utilized all of the members of the class would have to join. Normally this is impracticable, and the class action device is employed; but the jurisdictional amount is determined in precisely the same manner, and aggregation is proper. In the hybrid and spurious class suit, on the other hand, the rights are several and there can be no aggregation, whether the parties all join or the class action is resorted to."

The so-called "spurious" class action under the old Rule 23 was where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought (See old Rule 23 (a) (3)). Any judgment in the spurious class action was binding solely on the named parties; it was in reality an invitation to join. By its very definition, the character of the rights sought to be enforced in a spurious class action were "separate and distinct," and, therefore, under the doctrine of Pinel v. Pinel, supra, such

rights could not be aggregated to make up the jurisdictional amount.

Rule 23, as amended July, 1966, makes no provision for a spurious type of class action, and makes no reference to a "joint" or a "common" interest. The complaint alleges a breach of trust, and in paraphrasing the language of Rule 23 (b) (1), F. R. C. P., there is apparently an attempt to bring this action under such rule. However, since the prayer seeks direct individual damages for the respective shareholders of Missouri Fidelity, this action is more analogous to those situations contemplated by Rule 23 (b) (3), F. R. C. P. (See Notes of Advisory Committee on Rules following 28 USCA, Rule 23, as amended July, 1966.)

Rule 23 (b) (3), F. R. C. P., as amended July, 1966, provides, in part, to-wit:

> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> "(1) • • •
>
> "(2) • • •
>
> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D)

the difficulties likely to be encountered in the management of a class action."

A judgment in a class action brought under Rule 23, as amended, is res judicata as to the whole class except as to those members of a (b) (3) type of class action who specifically request to be left out of the action.

Because a judgment in a class action is now binding upon the entire class, and because spurious class actions no longer exist under the amended Rule 23, does it necessarily follow that the doctrine with respect to jurisdictional amount of Pinel v. Pinel, supra, no longer applies to class actions? This court thinks not.

Pinel v. Pinel, supra, specifically states, l. c. 60 L. Ed. 818, in part, to-wit:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount" (Cases cited).

The Pinel doctrine applied with equal force to class actions brought under Rule 23 which was but a procedural device to allow several plaintiffs to unite in a single suit.

Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit. The rule in no way purports to affect the jurisdiction of this court, nor do the Notes of the Advisory Committee on Rules indicate that the rule is to have such an effect. There is no reason why the Pinel doctrine should suddenly become obsolete with the passage of the amended

Rule 23, unless the new rule somehow changes the character of a plaintiff's right. That it does not is clearly shown by the following excerpt from the Notes of the Advisory Committee on Rules (see p. 62 of notes following 28 USCA, rule 23, as amended July, 1966), to-wit:

> "Subdivision (c) (2) makes special provision for class actions maintained under sub-division (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him."

Furthermore, a construal of the amended Rule 23 in such a way as to confer jurisdiction on this court where in a similar situation before the amendment to the rule it would not have had jurisdiction, would constitute a direct violation of Rule 82, F. R. C. P., as amended, which states, in part:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

See also DeLorenzo v. Federal Deposit Insurance Corp., 259 F. Supp. 193, l. c. 195, note 5.

The sole question before this court, then, is whether or not the demands of the plaintiff are separate and distinct from other persons in the class. If they are, then under

the Pinel doctrine the plaintiff may not aggregate such claims with those of others in the class.

The allegations of the plaintiff's complaint clearly indicate that her claims are separate and distinct. The complaint alleges that the plaintiff is the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of said stock at the time of the matters complained of was approximately $2.63 per share; and that the defendants received $7.00 per share for their stock. The prayer asks for damages in the amount of $1,200,000.00, to be divided among the individual shareholders in accordance with their respective share holdings. Thus, the plaintiff is alleging that she is entitled to $8,740.00 damages for her own stock.

For the foregoing reasons the court finds that the amounts in controversy in the present action does not exceed $10,000.00, and this court, therefore, lacks jurisdiction over the controversy. The defendants' joint motion to dismiss is sustained, and said cause is dismissed without prejudice.

Roy W. Harper,
U. S. District Judge.

APPENDIX C.

Rule 23.

CLASS ACTIONS.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or correspond-

ing declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any

member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and

that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX D.

United States Court of Appeals,
Tenth Circuit.

January Term, 1968.

The Gas Service Company,
Appellant,
v.
Otto R. Coburn, on behalf of himself and all others similarly situated,
Appellee.
No. 9635.

Appeal from the United States District Court for the District of Kansas.

Gerrit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before Woodbury*, Lewis and Hickey, Circuit Judges.

Lewis, Circuit Judge.

This is an interlocutory appeal authorized in compliance with 28 U. S. C., § 1292 (b), to allow appellate con-

* Of the First Circuit, sitting by designation.

sideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding $10,000, and that such individual claims are variable in amount[1] but would aggregate to more than $10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a

[1] By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was $7.81.

class action as presently set out in Rule 23 (a) and one or more of the additional requirements of 23 (b).[2] The class

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[2] The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the liti-

is numerous, a single question of law is presented common to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment[3] would not have been classified as a "true" class action and aggregation of claims would not have been permitted. See Aetna Ins. Co. v. Chicago, Rock Island & Pac. R. R., 10 Cir., 229 F. (2) 584. The Fifth Circuit in Alvarez v. Pan American Life Ins. Co., 375 F. (2) 992, has held that this result is

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gation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[3] The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary ir the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

still dictated after adoption of the new rule. Citing Clark v. Paul Gray, Inc., 306 U. S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F. (2) at 905. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U. S. 66, 72, the Supreme Court stated it thus:

> ". . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Com-

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[4] "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

[5] Clark v. Paul Gray, Inc., 306 U. S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the

mittee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true", "hybrid", and "spurious". "In practice", said the Committee, "the terms 'joint', 'common', etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true", "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in Provident Bank v. Patterson, ... U. S. ...., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensable parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under **any** circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been

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factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

answered in the affirmative, Gibbs v. Buck, *supra*, and it follows, under the new rule that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy.[6]

The judgment is affirmed and the cause remanded for further proceedings.

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[6] Professor Wright considers this to be a realistic view. He states:

> "The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

APPENDIX E.

Jose Aramis Alvarez, Individually, and in Behalf of All Those Similarly Situated, Appellant,

v.

Pan American Life Insurance Company, Appellee.

Augustin Goytisolo Recio, Individually, and in Behalf of All Those Similarly Situated, Appellant,

v.

Pan American Life Insurance Company, Appellee.

Nos. 22761, 22902.

United States Court of Appeals, Fifth Circuit.

March 27, 1967.

Diversity cases brought as class actions against insurer for relief for plaintiffs and other Cuban refugees similarly situated. The United States District Court for the Southern District of Florida, Charles B. Fulton, Chief Judge, dismissed both actions under diversity statute for lack of jurisdictional amount, and cases were consolidated for appeal. The Circuit Court, Griffin B. Bell, Circuit Judge, held, iter alia, that actions by insureds on behalf of themselves and other Cuban refugees similiarly situated based on claims that a perseverance bonus had accrued under policies, despite allegations and prayer directed against insurer's assets and alleging a refusal of contract voting rights, were actions for separate sums due plaintiffs and others of asserted classes, and such separate claims could not be aggregated to make jurisdictional amount required under diversity statute, even if new rule 23 relating to class actions were applied.

Affirmed.

1. Courts Key 328 (4)

New rule 23, adopted July 1, 1966, relating to class actions, did not abrogate well-settled principle that separate and distinct claims may not be aggregated to make jurisdictional amount in diversity case even in a class action. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

2. Courts Key 328 (4)

Actions by insureds on behalf of themselves and other Cuban refugees similarly situated based on claims that a perseverance bonus had accrued under policies, despite allegations and prayers directed against insurer's assets and alleging refusal of contract voting rights, were actions for separate sums due plaintiffs and others of asserted classes, and such separate claims could not be aggregated to make jurisdictional amount required under diversity statute, even if new rule 23 relating to class actions were applied. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

3. Courts Key 328 (4)

Where claims of respective members of asserted class were several and distinct, each was required to establish a requisite jurisdictional amount under diversity statute in order for his action to lie. Fed. Rules Civ. Proc. rule 23, 28 U. S. C. A.; 28 U. S. C. A., § 1332.

Joseph A. McGowan, Carey, Terry, Dwyer, Austin, Cole & Stephens, Miami, Fla., for appellants.

Sam Daniels, James A. Dixon, Dixon, DeJarnette, Bradford, Williams, McKay & Kimbrell, Miami, Fla., for appellee.

Before Wisdom, Bell and Godbold, Circuit Judges.

Bell, Circuit Judge.

These diversity cases, consolidated for appeal, were brought as class actions under old Rule 23, F. R. Civ. Procedure. Alvarez and Recio claimed relief for themselves and other Cuban refugees similarly situated against appellee, a mutual insurance company. Both actions were dismissed under the diversity statute for lack of the jurisdictional amount. 28 U. S. C. A., § 1332. These appeals followed.

[1] We affirm. In so doing we conclude that new Rule 23, adopted July 1, 1966, is applicable to these cases. However, we hold further that this rule is of no avail to appellants as it does not abrogate the well settled principle that separate and distinct claims may not be aggregated to make the jurisdictional amount even in a class action.

Although the cases differ factually, the aggregation principle is dispositive in both cases. Recio owned an insurance contract issued by appellee in the amount of $1,000.00. The Castro government expropriated appellee's assets in Cuba and, for this reason, payment on the contract in question was refused. Recio sued appellee in the Florida state courts and recovered all benefits then due under the contract. His federal suit is based on a claim that a perseverance bonus accrued later under the contract. His suit was for the amount due him, less than three hundred dollars, and such sums as were due other Cuban Nationals holding contracts with similar bonus provisions. The class was said to include more than five thousand such contract holders. The bonus clause required an annual payment of from two to six dollars into a fund to be paid only to those who lived for twenty years, i. e., those who persevered.

Alvarez was the holder of an insurance contract with appellee in the amount of $5,000.00. He sought his con-

tract rights and those of all other Cuban National policyholders similarly situated. He alleged that appellee had denied him all benefits due under the contract including loan and cash surrender values.

[2] Apparently aware of the principle that separate claims may not be aggregated, the tenor of the complaint was directed toward the insurance company assets from which the bonus payments would be made, in the case of Recio; and toward the assets as well as other contract rights such as voting, in the case of Alvarez. Recio alleged a conversion of the perseverance fund, sought the appointment of a receiver, an accounting, and to impress the fund with a trust. He did not specifically seek the sum due him but the record shows without dispute that he had never requested anything more of the insurance company than such sum as might be due him under the bonus plan. We hold that he was seeking the sum due him and such sums as may have been due others of the asserted class similarly situated.

Alvarez alleged a conversion of the total of the sums due all Cuban Nationals in the class, and a refusal to extend voting privileges due under a mutual insurance contract to him and his class. He sought an accounting, and an injunction requiring that appellee re-establish his interest and that of the class on its books, and that all claims be honored. This too was nothing more than a claim on behalf of each contract holder in the class for whatever might be due under the respective contracts.

The separateness of the claims of each contract holder is established by the case of Troup v. McCart, 5 Cir., 1956, 238 F. 2d 289, a class action, where prayers substantially as these were treated, by giving effect to substance over form, as a prayer for payment of sums due under individual insurance contracts. That case, in turn, rested on Eberhard v. Northwestern Mutual Life Ins. Co., 6 Cir.,

1917, 241 F. 353; and Andrews v. Equitable Life Assur. Soc., 7 Cir., 1941, 124 F. 2d 788, both of which involved prayers of the same nature. These cases all stand for the proposition that rights due under an insurance contract are those of creditor and debtor, and are several and distinct from claims which other contract holders may have against the same insurance company. The claims of the separate contract holders are not related to or dependent upon each other. Each case holds that the separate claims may not be aggregated to make the jurisdictional amount required under the diversity statute, § 1332, supra. See also Matlaw Corporation v. War Damage Corporation, 7 Cir., 1947, 164 F. 2d 281; and Knowles v. War Damage Corporation, 1948, 83 U. S. App. D. C. 388, 171 F. 2d 15.

These holdings are in accord with the long line of Supreme Court decisions to the effect that separate and distinct demands of two or more plaintiffs, unlike several plaintiffs uniting to enforce a right or title which they hold in common, may not be aggregated to make the jurisdictional amount. Lion Bonding & Surety Co. v. Karatz, 1923, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; Pinel v. Pinel, 1916, 240 U. S. 594, 36 S. Ct. 416, 60 L. Ed. 817; Troy Bank of Troy, Ind. v. G. A. Whitehead & Company, 1911, 222 U. S. 39, 32 S. Ct. 9, 56 L. Ed. 81; Clay v. Field, 1891, 138 U. S. 464, 11 S. Ct. 419, 34 L. Ed. 1044; Stratton v. Jarvis & Brown, 1834, 8 Peters (33 U. S.) 4, 8 L. Ed. 846. See also Alfonso v. Hillsborough County Aviation Authority, 5 Cir., 1962, 308 F. 2d 724; and 1 Moore's Federal Practice (2nd ed.), pp. 889-893; 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), pp. 114-117; and 2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), pp. 321-324.

Appellants would avoid this jurisdictional obstacle by asserting Rule 23, F. R. Civ. P., as a jurisdictional base in each case. They properly read old Rule 23 as per-

mitting aggregation if there is a true class action but their contentions that these were such actions were overruled in the District Court. Alfonso v. Hillsborough County Aviation Authority; Troop v. McCart; and Knowles v. War Damage Corporation, all supra, support the District Court in this respect. Each teaches that these were spurious class actions under 23 (a) (3); hence aggregation was not in order. We need not dwell on this problem, however, since we are of the view that it would not be inappropriate to apply new Rule 23 and we will apply it *arguendo*. The new rule has discarded the trichotomy developed under the old rule of treating class actions as either true, hybrid, or spurious.

There is a sound basis for applying new Rule 23. On February 28, 1966, the Supreme Court entered its adopting order which included new Rule 23. That order provided in pertinent part:

> "That the foregoing amendments • • • to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies." 384 U. S. 1029, 1031 (1966).[1]

The Advisory Committee's Note on the new rules, 39 F. R. D. 98, points out that the true category, rule 23 (a) (1), under old Rule 23[2] was defined as involving joint,

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[1] On the application of the injustice test, cf. Klapprott v. United States, 1949, 335 U. S. 601, 69 S. Ct. 384, 93 L. Ed. 266.

[2] Old Rule 23:

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all

or common, or secondary rights; the hybrid category, rule 23 (a) (2), as involving several rights related to specific property; and the spurious category, rule 23 (a) (3), as involving rights affected by a common question and related to common relief. The new rule[3] reflects an aban-

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before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is,

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

[3] New Rule 23 (384 U. S. 1039, 1047 (1966)), is as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or sub-

donment of the nature of the right concept for a more pragmatic approach. The new rule looks to such practical considerations as common questions of law or fact, the risk of inconsistent adjudications, the desirability of concentrating litigation in a particular forum, and the difficulties to be encountered in managing the action. See Advisory Committee's Note, 39 F. R. D. 98, supra; and Cohn, "The New Federal Rules of Civil Procedure", 54 Geo. L. J. 1204 (1966).

Notwithstanding that we have assumed, *arguendo*, that the new rule is applicable, the question of jurisdictional amount still exists unless the new rule has somehow abrogated the aggregation principle. We have found no authority for so holding, and we cannot assume that federal jurisdiction has been expanded in such a *sub silentio* manner. Since the inception of federal diversity jurisdiction, Congress has imposed a jurisdictional amount require-

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stantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

* * * * * * *

ment. In § 11 of the Judiciary Act of 1789, the jurisdiction of the federal courts in diversity cases was limited to controversies in which the amount involved exceeded the sum of $500.00. 1 Stat. 73, 78. In the interim the jurisdictional amount requirement has been continually enlarged to the present amount of $10,000.00.[4] In contrast, it was not until June 19, 1934, that Congress gave the Supreme Court power to enact rules of civil procedure for the federal courts. 28 U. S. C. A. § 723c, now 28 U. S. C. A. § 2072. Shortly thereafter, the Supreme Court made it clear that the delegation of rule making power to the court did not authorize the expansion or restriction of jurisdiction conferred by statute.[5] This limitation is expressed in Rule 82, F. R. Civ. P. (as amended, effective July 1, 1966), which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts * * *." 384 U. S. 1029, 1068.

Professor Moore has described the class action as nothing more than "* * * a procedural device to permit some to prosecute or to defend an action without the necessity of all appearing as plaintiffs or defendants." 3 Moore's Federal Practice (2nd ed.), p. 3480. This statement was

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[4] In 1887 the amount was increased to $2,000, 24 Stat. 552; in 1911 to $3,000, 36 Stat. 1087, 1091; and in 1958 diversity jurisdiction was limited to cases where the matter in controversy exceeded the sum of $10,000. 72 Stat. 415.

[5] In Sibbach v. Wilson & Co., 1941, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, the court said:

> "Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. * * * There are * * * limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute."

made in support of his view that the aggregation principle was applicable in full force to class actions brought under old Rule 23. Aggregation was proper, he stated, where the claim was joint or common, as in the true category, but not where there were several or separate claims as in hybrid or spurious class suit. This treatise law is in line with the decisions. As examples, in addition to Alfonso v. Hillsborough County Aviation Authority; and Troup v. McCart, both supra, the court in Steele v. Guaranty Trust Co. of New York, 2 Cir., 1947, 164 F. 2d 387, described a proceeding under Rule 23 (a) (3) as "* * * in effect, but a congeries of separate suits so that each claimant must, as to his own claim, meet the jurisdictional requirements." In Sturgeon v. Great Lakes Steel Corporation, 6 Cir., 1944, 143 F. 2d 819, a spurious class action, the court pointed out that the class action rule does not broaden the jurisdiction of the federal courts in diversity of citizenship cases, citing old Rule 82, F. R. Civ. P., which provided that the rules were not to be construed to extend or limit the jurisdiction of the District Court. The holding of these cases is no different from that of the Supreme Court in Clark v. Paul Gray, 1939, 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001, where the court raised the question of jurisdictional amount on its own motion and concluded that only one of several plaintiffs had made a showing of the requisite amount in controversy, and that the jurisdictional amount was necessary in the case of each of the plaintiffs where they asserted separate and distinct demands as distinguished from a joint or common interest in a single suit. The District Court was directed to dismiss as to all plaintiffs, save the one, for want of the jurisdictional amount.

In sum, it would appear that the principle of aggregation falls within the scope of jurisdiction which has been traditionally left to Congress rather than in the rule making power delegated to the Supreme Court by Congress. It follows that the principle is valid and subsisting not-

withstanding new Rule 23.[6] This conclusion is a recognized limitation on the full utility of the class action procedure in federal courts where some members of the class have claims in the jurisdictional amount and some do not. However, the law seems clear and an accommodation of jurisdiction to the class action procedure, if deemed necessary, is a question which addresses itself to the Congress or the Supreme Court.

[3] There is one last matter which should be mentioned. After appellee moved to dismiss the Alvarez case for lack of the jurisdictional amount, Mr. Alvarez called to the court's attention that another member of the class had a contract with appellee in the amount of $25,000. This suggestion is of no help to Mr. Alvarez or the class but it would enable this member of the class, just as was true in Clark v. Paul Gray, supra, to maintain his separate action, assuming the necessary amendment in the District Court. As we have noted, where, as here, the claims of the respective members of the class are several and distinct, each must establish the requisite amount for his action to lie. See 1 Barron & Holtzoff, Federal Practice and Procedure, (Wright ed.), pp. 114-117, and 2 Barron & Holtzoff, pp. 321-324. Cf. Eagle Star Insurance Company v. Maltes, 5 Cir., 1963, 313 F. 2d 778.

The judgment of dismissal in each case, as it relates to a class action, is

Affirmed.

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[6] Cf. caveat in Cohn, The New Federal Rules of Civil Procedure, supra, p. 1221, fn. 73. Professor Wright in the supplement, p. 89, to 2 Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), § 569, entertains the hope that the decision will be otherwise.